A

Wan Senik bin Wan Omar v Majlis Perbandaran Selayang

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(A)-1680–09 OF 2016
ABANG ISKANDAR, BADARIAH SAHAMID AND MARY LIM JJCA
6 JULY 2017

C

Civil Procedure — Judicial review — Application for leave — Leave to file judicial review application — Failure of appellant to obtain approval from respondent prior to renovation of appellant's house — Whether appellant came to court with unclean hands — Whether respondent was legally clothed by s 72(1) of the Street, Drainage and Building Act 1974 to require appellant to demolish illegally renovated structure of appellant's house — Street, Drainage and Building Act 1974 s 72

D

The appellant's contractor had failed to obtain the approval from the respondent prior to renovation of the appellant's house. The appellant had received a notice under s 70(11) of the Street, Drainage and Building Act 1974 ('the Act') offering a compound of RM12,500 for the said renovation without obtaining the respondent's prior approval and the respondent had issued a notice which required the appellant to demolish and vacate the illegal structure under s 72(1) of the Act. The appellant then paid the compound in the sum of RM800 to the respondent, after a discount was given by the respondent from the original sum of RM12,500. Subsequently, the respondent had agreed to approve the appellant's application to renovate his house subject to the consent of the neighbours from his cluster group and the house owners in the adjacent cluster group. However, the owner of a parcel of the adjacent cluster refused to give her consent due to personal problems with the appellant. She then lodged a complaint against one of the respondent's officers. Then, the respondent increased the assessment sum of the appellant's house after taking into consideration the illegal structure. The appellant was then ordered to vacate and demolish the illegally erected part of the appellant's house ('said decision'). The appellant's application for leave for judicial review, order of certiorari to quash the respondent's said decision and an order of mandamus to order respondent to decide on the appellant's application to renovate the house was dismissed by High Court, on two grounds ie: (a) the appellant had come to the court with unclean hands; and (b) the respondent was legally clothed by the provisions under s 72(1) of the Act to require the appellant to demolish the illegally renovated structure at the appellant's house. Dissatisfied with the decision, the appellant filed the present appeal.

E

F

G

H

I

Held, allowing the appeal with costs of RM2,000; setting aside the decision of high court; and granting prayer (1) in the judicial review application:

(1) The appellant had already paid the compound for the offence of erecting the structure in renovating his house without required approval from the respondent. The respondent accepted the payment by the appellant. The effect of paying a compound would be similar to an acquittal, in the sense that the appellant could not be charged for the same offence again in the future. Clearly it would be erroneous to say that he came to court with unclean hands (see para 23).

(2) The court was of the view that by opting to offer to compound the offence, the respondent had decided not to pursue the matter of demolition of the illegal structure. Had the respondent not offered the compound to the appellant, the invocation of s 72(1) of the Act would still be available at its disposal. But, by offering the negotiated compound which was accepted and duly paid by the appellant, the option to invoke s 72(1) of the Act was no longer available to the respondent to order the appellant to demolish the illegally erected structure (see para 26).

(3) By taking the illegally erected structure into account in the assessment rate, the irresistible inference must be that the respondent must have accepted the illegal structure had been approved. It was only reasonable for the appellant to say that the respondent was estopped from further complaining about the illegal structure and required it to be demolished when the respondent had acted upon it for its own benefit in raising the assessment rate that was payable by the appellant (see para 27).

(4) It was clear that the notice issued under s 72(1) of the Act was without legal basis. *Wednesbury* unreasonableness was another ground to strike down an impugned decision. The respondent had acted unreasonably in the present case given the factual matrix which was not seriously in dispute (see para 30).

[Bahasa Malaysia summary

Kontraktor perayu telah gagal untuk mendapatkan kelulusan daripada responden sebelum pengubahsuaian rumah perayu. Perayu telah menerima notis di bawah s 70(11) Akta Jalan, Parit dan Bangunan 1974 ('Akta') menawarkan kompaun RM12,500 bagi pengubahsuaian tanpa mendapatkan kelulusan terdahulu responden dan responden telah mengeluarkan notis yang mana mengkehendaki perayu untuk merobohkan dan mengosongkan struktur haram di bawah s 72(1) Akta. Perayu kemudiannya membayar kompaun tersebut dalam jumlah RM800 kepada responden, selepas diskaun diberi oleh responden daripada jumlah asal sebanyak RM12,500. Kemudiannya, responden telah bersetuju untuk meluluskan permohonan perayu untuk mengubahsuai projek rumahnya dengan izin jiran-jiran daripada kumpulan berkelompoknya dan pemilik-pemilik rumah bersebelahan kumpulan berkelompok tersebut. Walau bagaimanapun, pemilik sebidang tanah kelompok bersebelahan enggan memberi izinnya akibat daripada masalah

peribadi dengan perayu. Dia kemudiannya membuat aduan terhadap salah satu daripada pegawai-pegawai responden. Responden kemudiannya menambahkan jumlah penaksiran rumah perayu selepas mengambil kira struktur haram tersebut. Perayu kemudiannya diperintah untuk mengosongkan dan merobohkan bahagian rumah perayu yang dibina secara haram ('keputusan tersebut'). Permohonan perayu bagi izin untuk semakan kehakiman, perintah certiorari untuk membatalkan keputusan responden tersebut dan perintah mandamus untuk mengarahkan responden untuk memutuskan ke atas permohonan perayu untuk mengubahsuai rumah ditolak oleh Mahkamah Tinggi, atas dua alasan iaitu: (a) perayu telah hadir di mahkamah dengan tidak jujur; dan (b) responden dilindungi secara sah dengan peruntukan di bawah s 72(1) Akta untuk mengkehendaki perayu mengosongkan struktur pengubahsuaian haram di rumah perayu tersebut. Tidak puas hati dengan keputusan tersebut, perayu memfailkan rayuan ini.

Diputuskan, membenarkan perayu dengan kos sebanyak RM2,000; mengenepikan keputusan Mahkamah Tinggi; dan memberikan permohonan (1) dalam permohonan semakan kehakiman:

(1) Perayu telah membayar kompaun bagi kesalahan membina struktur dalam mengubahsuai rumahnya tanpa kelulusan yang diperlukan daripada responden. Responden menerima bayaran daripada perayu. Kesan membayar kompaun adalah sama kepada pembebasan, di mana perayu tidak boleh dituduh bagi kesalahan yang sama di masa hadapan. Jelas ia adalah salah untuk menyatakan bahawa dia hadir ke mahkamah dengan tidak jujur (lihat perenggan 23).

(2) Mahkamah berpandangan bahawa dengan memilih untuk menawar kompaun kesalahan tersebut, responden telah memutuskan untuk tidak meneruskan perkara perobohan struktur haram tersebut. Sekiranya responden tidak menawarkan kompaun kepada perayu, permohonan s 72(1) Akta akan masih boleh digunakan pada bila masa dan bagaimana yang diingininya. Tetapi, dengan menawarkan kompoun yang dirundingkan yang mana diterima dan dibayar oleh perayu, pilihan untuk membangkitkan s 72(1) Akta tidak lagi boleh digunakan oleh responden untuk memerintah perayu merobohkan struktur yang dibina secara haram tersebut (lihat perenggan 26).

(3) Dengan mengambil kira struktur yang dibina secara haram di dalam kadar penaksiran, inferens yang tidak dapat dielakkan adalah bahawa responden mesti menerima struktur haram telah diluluskan. Ia hanya munasabah bagi perayu untuk menyatakan bahawa responden telah dihentikan daripada mengadu selanjutnya mengenai struktur haram tersebut dan mengkehendakinya untuk dirobohkan apabila responden telah bertindak ke atasnya bagi faedahnya sendiri dalam membangkitkan kadar penaksiran yang boleh dibayar oleh perayu (lihat perenggan 27).

(4) Ia adalah jelas bahawa notis dikeluarkan di bawah s 72(1) Akta adalah tanpa asas undang-undang. Ketidakmunasabahan *Wednesbury* adalah alasan lain untuk membatalkan keputusan yang dipersoalkan tersebut. Responden telah bertindak secara tidak munasabah dalam kes ini mengambil kira matriks fakta yang tidak secara serius dipertikaikan (lihat perenggan 30).]

Notes

For cases on application for leave, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5950–5953.

Cases referred to

Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1 KB 223, CA (refd)
Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6, HL (folld)
Holman v Johnson (1775) 1 Cowp 341, KB (refd)
Saunders v Edwards [1987] 1 WLR 1116, CA (refd)
Vellino v Chief Constable of Greater Manchester [2001] EWCA Civ 1249, CA (refd)

Legislation referred to

Federal Constitution arts 7(2), 13(1)
Street, Drainage and Building Act 1974 ss 70(11), 72(1)

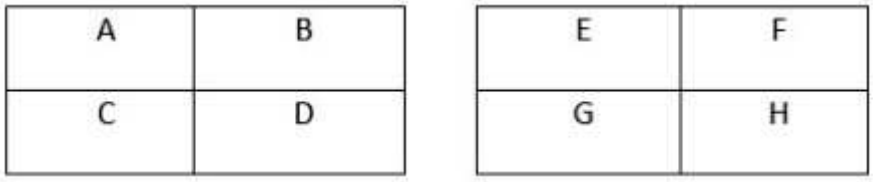
Appeal from: Judicial Review No BA-25–7–03 of 2016 (High Court, Shah Alam)

Anand Suppiah (Anand Suppiah and Co) for the appellant.
Nurzali bin Mohd Taib (Mohd Khairul Khailani bin Rakmad with him) (Zahir Khailani) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] Wan Senik bin Wan Omar ('the applicant') is the owner of a cluster house. His house is in parcel B as shown below:



A **[2]** Sometime in January 2015, the applicant appointed a contractor to renovate the house. For that purpose, a prior approval from Majlis Perbandaran Selayang ('the respondent') must be first obtained. However, the applicant's contractor failed to obtain the approval.

B **[3]** On 25 February 2015, the applicant had received a notice under s 70(11) of Akta Jalan, Parit, dan Bangunan 1974 ('Akta JPB 1974') offering a compound of RM12,500 for the said renovation without obtaining the respondent's prior approval.

C **[4]** Later, the respondent had issued a notice dated 11 March 2015 which required the applicant to demolish and vacate the illegal structure under s 72(1) of Akta JPB 1974.

D **[5]** On 20 March 2015, the applicant paid the compound in the sum of RM800 to the respondent, after a discount was given by the respondent from the original sum of RM12,500.

[6] However, it appeared that it was not the end of the matter. E Subsequently, pursuant to two meetings the appellant had with the respondent's representative dated 4 August 2015 and 27 October 2015 respectively, the respondent agreed to approve the applicant's application to renovate his house subject to the consent of the neighbours from his cluster group and the house owners in the adjacent cluster group. F

[7] Owners of parcels A, C, and D consented to the renovation but not the owner of parcel E of the adjacent cluster. She refused to give her consent as she was having personal problems with the applicant.

G **[8]** The respondent's representative had imposed the condition to obtain consent from the neighbours due to an action taken by the owner of parcel E who was dissatisfied with the renovation works. She had lodged a complaint against one of the respondent's officers to Pejabat Setiausaha Kerajaan Negeri H Selangor and had further threatened that she would pursue the matter to the Chief Minister's Office and Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') if the respondent did not demolish the illegal structure erected by the applicant.

I **[9]** On 26 February 2016, the respondent increased the assessment sum of the applicant's house after taking into consideration the illegal structure.

[10] Vide 'Notis Mengosongkan dan Meruntuhkan Bangunan Rumah No 59, Jalan 6/17, Bandar Tasik Puteri, 48020 Rawang, Mukim Rawang,

Daerah Gombak, Selangor Darul Ehsan' dated 2 March 2016 ('the said decision') the applicant was ordered to vacate and demolish the illegally erected part of the applicant's house. This said decision can be seen at p 84 of the record of appeal.

[11] Aggrieved by the said decision, the applicant filed an application for leave for judicial review ('JR') for among others, an order of certiorari to quash the respondent's said decision dated 2 March 2016 and an order of mandamus to order the respondent to decide on the applicant's application to renovate the house dated 3 April 2016.

[12] The High Court judge had dismissed the applicant's application, thus this appeal by the applicant to the Court of Appeal.

THE APPEAL

[13] We heard this appeal on 23 February 2017 and unanimously allowed the appeal with costs. We also set aside the decision of the learned High Court judge dated 5 August 2016. These are now our grounds having so decided.

[14] The applicant contended in his submission that the said decision had caused double jeopardy against him and he had been deprived of his right guaranteed under arts 7(2) and 13(1) of the Federal Constitution. This is because the applicant had paid the compound and thus cannot be punished for the second time for the very same offence.

[15] The other complaint by the applicant before us is that the respondent's order does not comply with s 70(11) of Akta JPB 1974 when it failed to obtain the order from the magistrate court beforehand. Section 70(11) of Akta JPB 1974 provides:

> Any person who makes any alteration to any building otherwise than is provided for in this Act or by-laws made thereunder or without the prior written permission of the local authority shall be liable on conviction to a fine not exceeding twenty-five thousand ringgit and a magistrate's court shall, on the application of the local authority, issue a mandatory order to alter the building in any way or to demolish it.

[16] The third issue raised by the applicant is that the respondent had taken into consideration irrelevant factors in arriving at its decision, particularly the complaint and threat by the owner of parcel E.

[17] Last but not least, the applicant contended that basically the respondent had agreed to the renovation works done by the applicant when it increased the

A assessment which had taken into consideration the illegally erected part of the house. The respondent now thus, is estopped from requiring the same to be demolished.

B **[18]** On the respondent's part, the respondent contended that the applicant had failed to obtain approval from the respondent before renovating the house. The second issue is that, the neighbour at parcel E is affected by the renovation works done by the applicant. The respondent also submitted that the approval from the respondent is still needed even after paying the fine. After all, in this case, the respondent had never given any approval to the applicant to renovate C the house.

[19] The learned High Court judge had dismissed the application for JR on two grounds, namely that the appellant had come to court with unclean hands. His hands were unclean because he had done the house renovation without the D required prior approval having first been obtained from the respondent. The other ground for the dismissal being the fact that the respondent was legally clothed by the provisions under s 72(1) of Akta JPB 1974 to require the appellant to demolish the illegally renovated structure at the appellant's house.

E OUR FINDINGS

[20] Having considered the submissions put forward on behalf of both parties, we had decided in favour of allowing the appellant's appeal. Essentially, F we were of the view that the finding by the learned High Court judge that the appellant had come to court with unclean hands was erroneous. The concept of unclean hands was one that was founded upon equity. The principle derives originally from the judgment of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341, in which it was said that 'no court will lend its aid to a man who G founds his cause of action upon an immoral or an illegal act'.

[21] Learned Justice Bingham LJ (as he then was) in *Saunders v Edwards* [1987] 1 WLR 1116 overlaid the principle with the following gloss:

> H Where the claimant's action in truth arises *ex turpi causa* he is likely to fail. Where the claimant has suffered a genuine wrong to which the allegedly unlawful conduct is incidental, he is likely to succeed.

[22] It has its genesis in the Latin maxim of *ex turpi causa non oritur actio*, which essentially means that a right cannot arise from a wrong. In essence, the I underlying jurisprudence is that the court ought not to be aiding such a litigant. Subsequent development of the law has led to the principle that a man should not benefit by his own wrong (see, for example the case of *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249 per Sir Murray Stuart-Smith).

[23] From the facts of this case, the appellant had already paid the compound for the offence of erecting the structure in renovating his house without the required approval from the respondent. There were negotiations regarding the amount of compound to be paid. From RM12,500 the final amount of compound to be paid was RM800. The respondent accepted the payment by the appellant. The effect of paying a compound would be similar to an acquittal, in the sense that the appellant cannot be charged for the same offence again in future. When he filed the application for JR of the said 2 March 2016 decision of the respondent, clearly it would be erroneous to say that he come to court with unclean hands in the sense of our understanding of the *ex turpi* rule.

[24] This brings us to the second ground of dismissal by the learned High Court judge where he had adverted to the fact that the respondent had the legal authority under s 72(1) to require the demolition of the illegal structure. Section 72(1) provides:

> (1) Where the local authority is satisfied that a building has been erected or is in the course of erection or is about to be erected in contravention of section 70 or, if such building has been erected prior to the coming into force of this Act, in contravention of any law then in force relating to buildings and in respect of which building approval under any law was not given subsequently, the local authority may by notice served on the owner of the land require him to do any one or more of the following acts:
>
> (a) to abstain from commencing or proceeding with the erection of such building;
>
> (b) to demolish such building within such time as the local authority may specify; and
>
> (c) to take steps as may be ordered by the local authority.

[25] Granted that the respondent was indeed so clothed with the authority, its exercise must be justified by the factual circumstances before such power may be invoked. In the context of this appeal, the appellant was offered a compound which he had paid. If he had not paid the compound, he would have been charged under s 70(11) of Akta JPB 1974 and on conviction, the court shall on application by the respondent issue an order to demolish the illegal structure.

[26] We were of the view that by opting to offer to compound the offence, the respondent had decided not to pursue the matter of demolition of the illegal structure. Had the respondent not offered the compound to the appellant, the invocation of s 72(1) would still be available at its disposal. But, by offering the negotiated compound which was accepted and was duly paid by the appellant, the option to invoke s 72(1) of Akta JPB 1974 was no longer

available to the respondent to order the appellant to demolish the illegally erected structure.

[27] Then there was the fact that the original amount of assessment that was levied against the appellant had included or taken into account the illegal structure in its calculation. Why should the illegal structure be included in the assessment rate that was levied against the appellant? By taking the illegally erected structure into account in the assessment rate, the irresistible inference must be that the respondent must have accepted the illegal structure has been approved. Learned counsel for the respondent was not able to give any justification as to why that was so when we addressed that question for his response. In the circumstances, it was only reasonable for the appellant to say that the respondent was estopped from further complaining about the illegal structure and requiring it to be demolished when the respondent had acted upon it for its own benefit in raising the assessment rate that was payable by the appellant.

[28] The law on JR is rather trite. Case law authorities have developed, by leaps and bounds, in this important area in the public law sphere. It is now beyond dispute that a decision made in exercise of public duty or function is susceptible to be quashed on recognised grounds by way of a JR application, as enunciated by Lord Diplock in the celebrated House of Lords decision in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 ('the *CCSU* case'). The learned Law Lord had opined as follows:

> Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action are subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community ...

[29] The ground of challenge premised on 'illegality' would encompass the complaints challenging the legality of the decision-maker's decision. In the *CCSU* case, Lord Diplock had confirmed that:

> ... by illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question.

[30] Premised on the above, it was clear that the notice issued under s 72(1) of Akta JPB 1974 was without legal basis. One of the accepted principles of JR is that an impugned decision is susceptible to be quashed if it is one that is

grounded on an illegality. *Wednesbury* unreasonableness is another ground to strike down an impugned decision (see the case of *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223 per Lord Greene MR). The respondent had acted unreasonably in this case given the factual matrix which was not seriously in dispute.

[31] To our minds, this appeal was one such situation where our appellate intervention was required to correct a patent wrong.

[32] Based on the above reasons, we allowed the appeal with agreed costs of RM2,000 subject to payment of allocator fees. The decision of the learned High Court judge dated 5 August 2016 was set aside. We granted prayer (1) in the JR application. The deposit was refunded to the appellant.

Appeal allowed with costs of RM2,000; decision of High Court set aside and prayer (1) in the judicial review application granted.

Reported by Jacqueleen Kho